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CASES AND MATERIALS

ON

CIVIL PROCEDURE

Edited by

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PREFACE

I

Civil Procedure is an introductory study of the Canadian court system. There is no need here to stress the importance of such a study. The administration of justice in courts always has been and always will be a primary and indispensable function of governments. When men live together, disputes inevitably arise as to the terms and conditions on which they shall live together. Left to themselves the disputants would resort to force. As a consequence, in all civilized countries, courts have been established where disputes may be settled amicably. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 143 (1907).

For the beginning law student a knowledge of the organization and functioning of courts is absolutely essential. It holds a place in his study of the body politic comparable to that held by anatomy in the medical student's study of the body natural. Upon it hangs so much else. Specifically, a knowledge of courts and court procedure is important for five reasons. First, representation before a court is still the central function of the legal profession. Its monopoly here is virtually complete. Every lawyer is an "officer of the court". And even if nowadays the average lawyer spends little or no time in court he should, when the occasion arises, know how to get into court and what to do when he gets there.

Second, a knowledge of the court system is the key to a knowledge of substantive law. Substantive law, consisting of the principles, standards and rules governing the day-to-day conduct of ordinary citizens, is what the ordinary person thinks of as law; most of the courses in law school are concerned primarily with substantive law; and most of the lawyer's practice - when he is advising clients and drafting documents - deals with substantive law. But this, the most immediately important branch of law cannot properly be understood apart from its institutional environment, that is, apart from the machinery of government required to make, interpret and enforce it. It is for instance impossible to read and properly understand the substantive law contained in court decisions - and most substantive law is of this kind - without knowing the nature of the courts that decided them, how the cases came there, and what points were presented for decision; this is particularly true of the older substantive law, of which Sir Henry Maine (the great nineteenth century English historian) has said that it has "the look of being gradually secreted in the interstices of procedure."

Third, a knowledge of the court system is necessary in order that the lawyer may play his part in reforming it. Courts are one of our great public institutions, comparable in influence to our schools, our churches and our legislatures: nowhere does government touch the life of the people more frequently and intimately than in the administration of justice in the courts. The responsibility for keeping these courts operating efficiently has been entrusted in a peculiar way to the keeping of the legal profession. As the late Professor Chafee of Harvard said, "the machinery by which disputes can be reasonably settled with a fair chance for all concerned to participate is our business and nobody else's. If this machinery does not run smoothly, we are indeed derelict in our duty." Unfortunately evidence is not wanting that we are derelict in our duty. Ours is a conservative profession and its record in this respect is not a good one. Every lawyer has a duty to understand the workings of the courts (whether he participates directly in them or not), lest in the matter of reform he be guilty of timidity due to ignorance.

Fourth, a knowledge of the court system is a necessary introduction to the study of jurisprudence. There is a tendency among legal philosophers to define justice too abstractly and too exclusively in terms of substantive rules of law, a tendency undoubtedly related to the fact that legal philosophers are philosophers more often than they are lawyers. But any practising lawyer knows that the justice of any decision depends on the way it was presented as much as on the way it was decided, and he knows therefore that our procedural codes - "mere practice and procedure", as it is said - contain the tools of justice and are as important as the substantive rules of law. This is a vital truth and perhaps a simple one. But history shows that other people than philosophers forget it. The founding fathers of the United States knew this history and made "due process" of law a constitutional requirement. We don't have their kind of constitution and we don't have a due process clause, and for this reason we sometimes need to be reminded just how important procedural justice is.

Fifthly and finally, a knowledge of the court system is necessary to understand the legal system as a whole, and the proper relationship between its parts, particularly the proper relationship between courts and legislatures. These two are the basic and primary agencies by which law is made, and one of the recurring problems of any legal system is to know when law should be made by one or by the other, and when by a combination of both. To take an example, in the field of business competition there is the question whether the definition of unfair competition should be worked out by the courts according to their typical trial-and-error method? Or whether a comprehensive definition should be provided by Parliament? Or whether the courts and Parliament should share the work, Parliament defining the general principles and the courts elaborating the standards by which these principles are to be applied? For the solution of this type of problem one needs to have a thorough grasp of the capacities and limitations of both the parliamentary and judicial processes. This course is intended to help in supplying the latter.

II


The Canadian court system is not a simple affair. There are ten more or less autonomous provincial court systems; there is a separate federal court system; each of these eleven systems has its own code of procedure; and in each system there is a distinction between civil and criminal procedure. This diversity would make the task of the law student an almost impossible one were it not for the fact that the diversity is one of detail and not of principle.

In the common law provinces and in the federal courts civil procedure is based on a common historical tradition. And in Quebec the similarities to that tradition are more striking than the differences. Criminal procedure, being a federal matter, is common throughout the country, and the distinction between civil and criminal procedure is not as great as it is sometimes supposed to be; it is a characteristic of our law that the two are essentially the same, criminal procedure being a special and somewhat simplified form of civil procedure in which the Crown acts as plaintiff. There is thus, among the various court systems, a remarkable similarity in essentials notwithstanding the disparity in minutiae.

Because of this similarity it is possible to concentrate on one particular system, indeed it is possible to concentrate on a particular action in a particular court in a particular system, and not suffer much in comprehensiveness. For this reason the focus of our attention shall be the study of a civil action in the Supreme Court of Ontario. That is to say that our special concern shall be the Ontario Judicature Act and the Rules of Practice and Procedure passed pursuant thereto (hereafter referred to simply as the Act or the Judicature Act.) This Act is like all the other Canadian Judicature Acts in being patterned after the English Judicature Act of 1875 and consequently is typical of all of them. Indeed the basic institutions and conceptions of the Ontario Act are to be found throughout the whole of the common-law world - the United States and the English-speaking dominions of the Commonwealth as well as England itself: all these countries derive the main outlines of their court systems from a common source, England.

Our method of proceeding shall be to take up, more or less in chronological order, the major problems that arise in the course of conducting an ordinary action in the Supreme Court of Ontario, from the issue of the writ of summons down to the issue of the writ of execution. For a brief survey of the course to be covered the student may wish to read the chapter by the present editor on Procedure and Judicial Administration in Canada in *Canadian Jurisprudence: The Civil and Common Law in Canada* (ed. McWhirrey 1953). Our point of view shall, for the most part, be that of counsel engaged in such a trial. It is hoped that by taking the subject this way, in a realistic and integrated manner, will help to overcome the curse of dullness that has plagued it in the past when it was conceived of as an exercise in memorizing a long list of apparently unrelated trivia. The Judicature Act and related materials, containing the principles, standards and rules by which we officially settle controversies by adjudication, stands as one of the great achievements of the English-speaking people and ought to be studied in that spirit.

In concentrating on the major phases of litigation in the context of a modern trial it has been necessary to neglect the history of the subject. Formerly, great stress was placed on the historical part, especially in dealing with the original writ and forms of action. But this was a great strain on the student's patience and the lecturer's time. Except for the real scholar a little history goes a long way. Consequently we only do enough history to relate modern Ontario procedure to its double origin in the practice of the English Courts of Common Law, on the one hand, and Court of Chancery, on the other.



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III

The literature on procedure is weak. There are many books on procedure but they are, too often, mere digests. The typical text is a "wilderness of single instances" devoid of commentary or criticism or synthesis. It is true that there are some good histories and some good texts on special subjects but there is nothing of a comprehensive nature comparable to the scholarly work available in torts, contracts, property, criminal law and other branches of substantive law.

In a way this is an odd state of affairs for some of the greatest legal scholars and thinkers have been interested in procedure. For instance it was said of Jeremy Bentham, perhaps the greatest of them all, that procedure was "the favourite subject of [his] intensive attention and prolonged study." More recently people such as Mitland, Ames, Langdell, Pound, Chafee, Scott, great scholars all of them, have devoted much time to procedural subjects. But none of these scholars has left his mark in the form of a comprehensive critical study. Bentham did indeed write at length on procedure but unfortunately for us that was a hundred and fifty years ago. Moreover he has, so to speak, out-Benthamed himself: he wrote as a reformer and was so successful that many of the reforms he advocated came to pass, to the point that today his writings are mainly of antiquarian interest.

If there are no texts in the best sense of that word there is no dearth of digests and books of precedent. These latter are of doubtful value for the student but he should at least be familiar with the names of the more important ones: they crop up in judicial opinions and of course are indispensable to the practitioner. Among English works for instance the student should know Odger's little book on Pleading and Practice as well as, say, Bullen & Leake's Precedents; and among Canadian works (if he intends to practice in Ontario), he should know the various annotated editions of the Ontario Judicature Act by Holmsted & Langton (the standard work), French and Chitty.

The basic working materials for the course consist of (1) the Queen's Printer edition of the Ontario Judicature Act and Rules and (2) the casebook. For the student these are absolutely necessary. Normally they would also be sufficient. But the casebook at present is in a temporary and incomplete form and it will be necessary in the latter part of the course to use library materials.

September, 1959

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CHAPTER X. COSTS

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